No. 2534

In the Circuit Court of Appeals of the United States

FOR THE NINTH CIRCUIT

LARKIN-GREEN LOGGING COMPANY,
a corporation, *Appellant-Defendant,*

vs.

R. L. SABIN, Trustee in Bankruptcy of the Estate of CONSUMERS LUMBER & SUPPLY COMPANY, a corporation,
Respondent-Plaintiff.

APPELLANT'S BRIEF

KOLLOCK, ZOLLINGER & MCDOWALL,
Attorneys and Solicitors for Appellant.
BEACH, SIMON & NELSON,
SIDNEY TEISER,
Attorneys and Solicitors for Respondents.

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STATEMENT OF FACTS

On December 18, 1912, Larkin-Green Logging Company, a corporation, appellant-defendant herein, instituted an action at law in the Circuit Court of the State of Oregon for Multnomah County against Consumers Lumber & Supply Company, and a writ of attachment was duly issued therein, and levy under said writ was duly made by the Sheriff of Multnomah County, Oregon, on all the property, real and personal, of said Consumers Lumber & Supply Company. The property remained in the actual and constructive possession of the Sheriff under said writ of attachment, to April 17, 1913.

On April 17, 1913, there was filed in the above

entitled court, sitting as a court of bankruptcy, the petition in involuntary bankruptcy of E. C. Atkins & Company, a corporation, and others, against said Consumers Lumber & Supply Company, praying that said corporation might be adjudicated a bankrupt.

The petition which is set forth in full in the complaint herein, after alleging the incorporation, the indebtedness and the insolvency of the Consumers Lumber & Supply Company, makes the following allegation as an allegation of an act of bankruptcy:

> "That within four months next preceding the date of this petition, the said Consumers Lumber and Supply Company committed an act of bankruptcy in that it allowed Larkin-Green Logging Company to levy an attachment on all of the assets and property of said Consumers Lumber & Supply Company, which attachment has never been released or discharged or vacated, and which attachment was levied on December 18, 1912, and will become a prior lien and cannot be removed or set aside or dissolved through bankruptcy proceedings after April 18, 1913; that said Consumers Lumber & Supply Company has done nothing to vacate or set aside said attachment and has not gone into bankruptcy voluntarily, and its failure to do so will thereby create a preference in favor of said Larkin-Green Logging Company

on said December 18, 1912. Said attachment is still a lien on all of the assets of said debtors."

A demurrer to the petition was filed by Larkin-Green Logging Company, intervening for that purpose, which demurrer was overruled. Thereafter claims of creditors were proved before the referee, including the claim of appellant. A trustee was appointed, and the respondent herein was subsequently elected trustee on the resignation of the former trustee. The appellant, believing the bankruptcy proceedings to be void under a recent decision of the Supreme Court of the United States, continued the original action in the State Court, and is proceeding to sell the property on execution. This suit is instituted for the purpose of enjoining the threatened sale. The motion of appellant to dismiss the complaint was denied by the District Court, and from that decision this appeal has been perfected.

POINTS AND AUTHORITIES

I.

The Statute.

National Bankruptcy Act, 1898.

Acts of Bankruptcy, Section 3, a (3).

"Act a of bankruptcy by a person shall consist of his having * * * suffered or permitted while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or

final disposition of any property affected by such preference, vacated or discharged such preference."

Process, Pleadings and Adjudications.

Section 18 a.

"Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time."

Section 19 a.

"A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided

and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed."

II.

Jurisdiction.

1. In General.

Collier on Bankruptcy, 10th Ed. p. 23 c.
Bardes v. Hawarden Bank, 178 U. S. 524.
Loveland on Bankruptcy, 4th Ed. Sec. 191.

2. Invoked by Filing Petition.

Collier on Bankruptcy, 10th Ed. p. 73.
Collier on Bankruptcy, 10th Ed. p. 413 f.
Loveland on Bankruptcy, 4th Ed. Vol. 1, Section 29.
Loveland on Bankruptcy, 4th Ed. Vol. 1, Section 30.
In re First National Bank of Belle Fouche, 152 Fed. 64.
In re Kindt, 98 Fed. 867.

III.

Adjudication, if within the jurisdiction of the court, is voidable upon direct attack but conclusive against collateral attack; if not within the jurisdiction and the record affirmatively shows the lack of jurisdiction, it is void for all purposes.

Collier on Bankruptcy, 10th Ed. p. 436.
Loveland on Bankruptcy, 4th Ed. Sections 234, 244.
Metcalf v. Watertown, 128 U. S. 586.
Railway Co. v. Ramsey, 89 U. S. 322.
In re Plotke, 104 Fed. 964.
St. L. R. R. Co. v. Pacific Ry. Co., 52 Fed. 770.

Adams v. Terrell, 4 Fed. 796, 800.
Williamson v. Berry, 8 Peters, 540.
Elliott v. Piersol, 1 Peters, 328.
United States v. Arrondondo, 6 Peters, 691.
Voorhees v. Bank of United States, 10 Peters, 475.
Thompson v. Whitman, 18 Wall. 570.
Knowles v. Gaslight & Coke Co., 19 Wall. 58.
Elwood v. Northrup, 106 N. Y. 172.
Natell v. Torey, 65 N. Y. 294.

IV.

The petition for involuntary bankruptcy filed against Consumers Lumber & Supply Company and upon which adjudication was made alleged but one act as an act of bankruptcy, and that is not an act of bankruptcy under the statute.

Citizens Banking Co. v. Ravenna National Bank, U. S. Adv. Ops. 1913, pp. 807, 809.
Oral Findings of the District Court in the case at bar.

V.

The adjudication was null and void, and is therefore subject even to collateral attack.

In re New York Tunnel Co., 21 Amer. Bktcy. Rep. 531, 166 Fed. 84.
In re Elmira Steel Co., 5 Amer. Bktcy. Rep. 484, 109 Fed. 456.
In re Columbia Real Estate Co., 4 Amer. Bktcy. Rep. 416, 101 Fed. 970.
Reynolds v. Stockton, 140 U. S. 270.
In re Stein, 130 Fed. 377.
Thatcher v. Powell, 6 Wheaton, 119.
Noble v. Union River Logging Co., 147 U. S. 173.
Rich v. Mentz Township, 134 U. S. 632.

Murray v. American Surety Co. of New York, 70 Fed. 341.
Settlemeier v. Sullivan, 97 U. S. 444-449.
Galpin v. Page, 18 Wall. 366.
In re Sawyer, 124 U. S. 200.
Elliott v. Piersol, 1 Peters, 328, 340.
Wilcox v. Jackson, 13 Peters, 498, 511.
Hickey v. Stewart, 3 Howard, 750, 762.
Thompson v. Whitman, 18 Wall. 457, 467.
In re Louisell Lumber Co., 209 Fed. 785.

VI.

A want of jurisdiction affirmatively appearing on the face of the record cannot be cured, nor a judgment rendered on such record validated by consent appearance, ratification or estoppel.

Metcalf v. Watertown, 128 U. S. 586.
Bank v. Calhoun, 102 U. S. 260.
State v. Judge of 2nd Judicial District, 13 La. An. 89.
Burkle v. Eckart, 3 N. Y. 132.
Ansonia Brass & Copper Co. v. New Lamp Chimney Co., 64 Barb. 435.
Johnson v. Ball, 15 N. H. 407.
Central Trust Co. v. Virginia Steel & Iron Co., 55 Fed. 769.
State v. Tolleston Club, 53 Fed. 18.

ARGUMENT

The decision of the trial court rests upon the syllogism that courts of bankruptcy are courts of general, although limited, jurisdiction; that their judgments possess the attributes of finality and estoppel which pertains to those of courts of general jurisdiction; that the adjudication in bankruptcy was within the jurisdiction of the court, and

that it is, therefore, valid as against collateral attack.

Appellant's position in the lower court and on this appeal is, that upon the fact of the record in the bankruptcy proceedings, it affirmatively appears that the District Court of the United States, sitting as a Court of Bankruptcy, was wholly without jurisdiction to entertain the petition for involuntary bankruptcy filed by creditors of the Consumers Lumber & Supply Company, to adjudicate it a bankrupt, to appoint a trustee, or to take any steps whatever in the premises; that the adjudication is null and void for any and all purposes, at any time, and that it cannot be cured or rendered valid or enforcible by the consent or appearance of the appellant, nor on any theory of ratification or estoppel.

It may definitely be understood that appellant's attack upon the judgment or adjudication of the Court of Bankruptcy is a collateral attack and that it must sustain the burden incident thereto.

To the major premise of the decision of the Honorable District Court, appellant takes no objection. It is respectfully urged that the minor premise and, therefore, the conclusion are erroneous.

Upon the question whether the failure of a debtor, for a period of one day less than four months after a levy upon his property, to vacate or discharge such levy, is a final disposition of the property affected by the levy, within the meaning of the provisions of the Bankruptcy Act just quoted, was a

matter very considerably in doubt at the time of the filing of the petition hereinabove referred to.

In Folger v. Putnam, 114 C. C. A. 513, 194 Fed. 793, at page 797, it was held by the Circuit Court of Appeals, for this circuit, that such failure was in itself an act of bankruptcy, and it was upon the strength of that decision that the demurrer of this appellant to the petition in bankruptcy was overruled.

The recent case of Citizens Banking Company v. Ravenna National Bank, U. S. Adv. Ops. 1913, pp. 807, 809, definitely settled the question and answers in the negative the following questions, certified to the court by the Circuit Court of Appeals for the Sixth Circuit:

1. Whether the failure by an insolvent judgment debtor, and for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a final disposition of the property affected by the levy, under the provisions of Section 3 a (3) of the Bankruptcy Act of 1898;

2. Whether an insolvent debtor commits an act of bankruptcy, rendering him subject to involuntary adjudication as a bankrupt under the Bankruptcy Act of 1898, merely by inaction for the period of four months after the levy of an execution upon his real estate.

The court says:

"We conclude that both of the questions pro-

pounded by the Circuit Court of Appeals should be resolved in the negative."

It is thus definitely determined that the only act of bankruptcy alleged in the petition is not an act of bankruptcy, and the Honorable District Court, in the decision from which this appeal is perfected, expressly states that the former decision of the court, overruling the demurrer to the petition, was erroneous under the doctrine now definitely established by the Supreme Court of the United States.

The jurisdiction of all courts of the United States, and especially of the District Courts sitting as Courts of Bankruptcy, is only such as is conferred upon them by the express provision of the United States Constitution and Acts of Congress.

Collier, in his authoritative work on "Bankruptcy," says: (10th Ed. p. 73)

> "In most of the continental bankruptcy systems, acts of bankruptcy, in our sense of the term, are unknown. Mere cessation of payment is enough to entitle the creditors to resort to the court. In France the debtor is legally bound to notify the court that he has stopped payment. Indeed, in several of the Latin systems, the court may declare a debtor a bankrupt on its own motion. Anglo-Saxon jurisprudence, while allowing the debtor to initiate bankruptcy by his own declaration or petition, not only does not otherwise permit the court to adjudicate save at the instance of creditors, but even affords further protection

against arbitrary or unjust interference with the property of the individual by providing that he shall not be amenable to bankruptcy unless he has done or suffered certain acts, which either amount to actual or constructive fraud on creditors, or are tantamount to declarations of hopeless insolvency. These acts are called under our present statute, acts of bankruptcy."

(Page 23 c).

"The origin of courts of bankruptcy is statutory and they have no powers or jurisdiction other than is conferred on them by or necessarily implied from the statute. Their jurisdiction is limited, that is, limited in respect to the subjects over which they may exercise jurisdiction. In respect to the matters coming within their jurisdiction, their judgments possess every attribute of finality and estoppel which pertains to those of courts of general jurisdiction."

In Loveland on Bankruptcy we find the following statement (Section 191):

"To warrant or justify the institution of involuntary proceedings against a debtor, three things must concur with reference to such debtor. First, the debtor must be within the class subject to the provisions and entitled to the benefits of the statute as an individual bankrupt. Second, he must owe debts to the

> amount of $1000 or over. Third, he must have committed an act of bankruptcy within four months prior to the filing of the petition. These facts are jurisdictional and must all exist in order to give the court power to adjudicate the debtor a bankrupt. If any one of these three things does not exist, the proceeding fails."

The jurisdiction of the court to hear and determine is invoked, in an action at law or suit in equity, by filing the complaint or bill; in a criminal proceeding, by the indictment; in a proceeding in involuntary bankruptcy, by filing the petition in bankruptcy.

Loveland on Bankruptcy (4th Ed. Vol. 1, Section 29) says:

> "The jurisdiction of the court is invoked in bankruptcy by filing a petition to take the benefit of the act. It may be said generally that the bankruptcy jurisdiction may be exercised upon a petition, motion, ruling to show cause, or other summary proceedings."

(Section 30).

> "The jurisdiction of a court of bankruptcy is invoked by a debtor or his creditor filing a petition to take the benefit of the act. Proceedings in bankruptcy are commenced when the petition is filed and before the subpoena is issued or served. The effect of filing the petition is to give the court jurisdiction of the case and to bring the estate immediately within the

custody of the court and to subject it to its administration. The moment the petition is filed the jurisdiction of the court attaches and extends over the estate with power to restrain any act which will interfere with its administration in bankruptcy."

Collier on Bankruptcy, 10th Ed. (page 413 f) says:

"Petition confers jurisdiction. The moment the petition is filed jurisdiction begins. This is the commencement of the proceeding even though the subpoena does not immediately issue, or if issued is not served within the time limited. As has been stated in a recent case (Board of County Commissioners v. Hurley, 169 Fed. 92), 'Indeed, the condition at the time of filing of the petition measures the extent of the estate and the rights of all creditors of the bankrupt and all persons interested in the property throughout all the provisions of the law. So far as the jurisdiction of the court is concerned, the filing of the petition operates as a *lis pendens* and is notice to all the world. This is in recognition of the often repeated maxim that the filing of a petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction.' "

It has been argued that these statements of the learned text writers are erroneous—that the jurisdiction is conferred by the statute and is effective

upon service of the subpoena. This, we submit, is a mere playing with words. General jurisdiction to adjudicate bankrupt is undoubtedly conferred by the statute, and jurisdiction over the person is only consummated by the service of process, but the jurisdiction conferred by the statute can operate only when invoked by a proper pleading.

Judge Shiras, in In re Kindt, 98 Fed. 867, uses this language:

> "When the petition and schedule duly signed and sworn to by the bankrupt were filed in the clerk's court, the jurisdiction over the case and over the person of the bankrupt was acquired by the court. The jurisdiction was acquired by the filing of the petition."

In Griffith v. Frazier, 8 Cranch, 9, Chief Justice Marshall had before him for consideration the judgment of the "ordinary" or probate court of Georgia, appointing an executor. The jurisdiction to appoint executors was unquestionably vested in the court by the statute, and the great founder of American jurisprudence says:

> "The well-known distinction between an erroneous act or judgment by a tribunal having cognizance of the subject matter and the act or judgment of a tribunal having no cognizance of a subject is not denied, but it is contended that the ordinary had jurisdiction in this case. The ordinary in South Carolina is the court in which wills are proved, in which letters testa-

mentary and letters of administration are granted; he judges whether the applicant be entitled to administration or not and rejects or admits the claim according to his opinion of the law. Whether his judgment be correct or not, still it is his judgment and when exercised upon an application for administration it is exercised upon subject cognizable in his court. That he grants letters of administration proves that he has jurisdiction in such cases, and if he grants administration in one of them improperly, the judgment is erroneous and voidable, but not void. This argument has been very strongly urged and there is great force in it. The difficulty of distinguishing those cases in which a court having general testamentary jurisdiction may have been said to have acted on a matter not within its cognizance, is perceived and felt, but the difficulty of marking the line does not prove that no such line exists. Illustration—the appointment of an administrator for a man not dead; the appointment of an administrator where the executor is present and qualified. A majority of the court is of opinion that administration was granted by a court having no jurisdiction in the particular case, and is therefore absolutely void."

In In re Sawyer, 124 U. S. 200, the circuit court had enjoined certain state officers from performing duties of offices to which they claimed to have been

legally eletced. Injunction is an equitable remedy vested generally in Circuit Courts of the United States by the statutes creating those courts. Mr. Justice Grey says:

> "The Circuit Court of the United States was without jurisdiction or authority to entertain the bill in equity for an injunction. As this court has often said, where a court has jurisdiction it has a right to decide every question which occurs in the case, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court; but if it acts without authority, its judgments and orders are regarded nullities. They are not voidable but simply void. Elliott v. Piersol, 1 Peters, 328, 340; Wilcox v. Jackson, 13 Peters, 498, 511; Hickey v. Stewart, 3 Howard, 750, 762; Thompson v. Whitman, 18 Wall. 457, 467. The case cannot be distinguished in principle from that of a judgment of the common bench in England in a criminal prosecution which was *coram non judice,* or the case of a sentence passed by the Circuit Court of the United States upon a charge of an infamous crime without a presentment or indictment by a grand jury. The Circuit Court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumes are null and void."

In Rich v. Mentz Township, 134 U. S. 632, the County Judge of a New York county had entered an order or judgment on petition of taxpayers that certain bonds should be issued. The jurisdiction to hear and determine on such petition was expressly vested in the court by special statute. The court says:

> "It is forcibly argued that the judgment of the county judge is not open to collateral attack, but this assumes that the jurisdiction of the county judge has been properly invoked, and has no application where that is not the case. Proof as to the allegations of this petition may have been taken; such proof did not necessarily involve an inquiry into whether a part of the petitioning taxpayers were such because of the payment of highway taxes or taxes on dogs, and, as we have stated, the judgment does not in terms say that such were not included. The authority conferred by the act must be exercised in strict conformity to and by a rigid compliance with the letter and spirit of the statute. As on the face of these proceedings there was an entire want of power to issue the bonds, no reference to the doctrine of estoppel need be made."

We submit, therefore, that the jurisdiction of United States District Courts, sitting as Courts of Bankruptcy, is conferred, defined and limited by the statute, but before a judgment or adjudication can be entered, which will have any effect and be other than a mere nullity, a petition must be filed

We would call the court's attention to the fact that in the case at bar, although no amendment was sought, an allegation is made in the pleading that the bankrupt, after the filing of the petition and more than four months after the date of the attachment of appellant's lien, filed its written acknowledgment of insolvency and its willingness to be adjudicated a bankrupt. Louisell Lumber Company, supra. The case is, therefore on all fours with the case at bar, and has direct application to the suggestion of the lower court that an amendment might have been made.

The oral findings of the District Court cite many authorities to the effect that the judgment of the court is conclusive against collateral attack, but we respectfully submit that a critical analysis will show that no one of them will sustain the decision of the court in the case at bar.

We believe all the cases cited by the court and all adjudicated cases holding valid as against collateral attack erroneous adjudications in bankruptcy fall into one of three classes:

First: Where the petition contains in proper and legal form all the necessary allegations, and, after adjudication, it is sought in a collateral proceeding to contravert the facts alleged in the petition and established by the adjudication;

Second: Where the allegations of the petition are defective and insufficient upon demurrer or direct attack, but may be deemed cured by testimony;

Third: Where the petition fails to allege jurisdictional facts such as residence or amount of claims, and the court having entered judgment thereon, it must be presumed that the court had heard and determined such jurisdictional facts affirmatively.

The distinction between cases falling under one of these classes and cases where a total want of jurisdiction appears affirmatively on the face of the record is clearly set forth in many adjudicated cases.

In the case of Matter of New York Tunnel Company, 21 Am. Bankruptcy Rep. 531; 166 Fed., Vol. 84, in the Circuit Court of Appeals, before Judges LaCombe, Cox and Ward, the opinion written by Judge Ward, makes the following critical distinction between proceedings and adjudications purely void and those which are merely erroneous:

> "If a petition for adjudication were made by only two creditors, the law requiring three, there would be a jurisdictional defect on the face of the record, making any adjudication void. On the other hand, if the aggregate amount of claims were stated to be $500 as required by law, and because of setoffs or other reasons was in point of fact less, an adjudication would be an error to be corrected by appeal. So, if the petition were against a railroad company there would be *on the face of the record* such a jurisdictional defect as would make the adjudication void; whereas, if the

> corporation might or might not be considered within the Act, and adjudication, even if erroneous, would have to be corrected by appeal."

The case, In re Elmira Steel Company, 5 Amer. Bankruptcy Rep. 484; 109 Fed. 456, from the Western District of New York, contains an exceedingly interesting discussion on this question.

The opinion is written by Referee Munn and was adopted by Judge Hazlett, District Judge, in its entirety.

It appears from the opinion that a petition in involuntary bankruptcy was filed in the U. S. District Court for the Western District of New York, December 18, 1900, reciting that the alleged bankrupt was a corporation, organized and existing under the laws of the State of New York. On January 5, 1901, the alleged bankrupt filed its answer, reciting that on January 3, 1901, in an involuntary proceeding instituted against it in the Eastern District of Pennsylvania it had been adjudicated a bankrupt. It became necessary for the Referee to determine the question as to the status of the proceedings in the Pennsylvania court. At page 496, referring to the petition in the New York court, the Referee uses this language:

> "The petition fails to state any length of time during which the bankrupt has had its principal place of business, domicile or residence within the Western District of New York. No objection was made. Nevertheless, as the defect in the petition affects the question

> of jurisdiction, it needs to be considered, and it would be fatal to the further maintenance of this proceeding *if it had not been supplied upon trial.*"

He then finds as a fact that the omission in the petition was supplied by evidence on trial.

In reference to the petition in the Eastern Pennsylvania District Court, the Referee uses this language:

> "The petition in the Eastern Pennsylvania District Court contains no allegation whatever as to the character of the corporation against which it was directed. The conclusion is irresistible that this petition conferred no jurisdiction whatever upon the Eastern Pennsylvania District Court, and that all proceedings therein, including the adjudication made upon that petition and upon all subsequent proceedings which have been made or may be had thereunder, including the appointment of receivers, and the appointment of a trustee, if any, and his title, are absolutely void as against any person who anywhere or at any time may raise the objection."

In Encyclopaedia of United States Supreme Court Reports, Vol. 7, page 743, we find the following language:

> "The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect

to jurisdictional facts concerning which the record is silent. Hence, when a judgment of a court of superior authority is attacked collaterally for the want of jurisdiction, such a presumption cannot be indulged when it affirmatively appears from the pleadings or evidence that jurisdiction was wanting. Where the special powers conferred upon a court of general jurisdiction are exercised in a special manner, not according to the course of the common law; or where the general powers of the court are exercised over a class not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court."

In re Stein, 130 Fed. 377:

"The reason given for their omission" (certain claims of creditors) "cannot affect the question of the validity of the petition as a basis for invoking the jurisdiction of the court. The law requires that there shall be certain averments specified by the Bankruptcy Act of July 1, 1898, Chap. 541, and if they are omitted the court has no jurisdiction in the matter. Amendment to the petition refused."

Murray v. American Surety Company of New York, 70 Fed. 341, before this court, was an action on two bonds executed by the defendant. The plaintiff had been appointed receiver by the Superior Court of San Diego County, State of California.

There, as in the case at bar, the plea was to the jurisdiction of the court in appointing the plaintiff to the office. The court speaking by Judge Hawley says:

> "In whatever light this question may be viewed, we are directly face to face with the unquestioned rule of law that in all special statutory proceedings the measure of the court's power is the statute itself. Whatever steps are provided for by the statute may be taken by the court and no matter how irregular or erroneous its action may be in regard thereto, it is conclusive until reversed upon appeal, and cannot be collaterally assailed; but the judgment of the court having no jurisdiction of the subject matter or the parties, or the exercise of a power by a court not authorized by the statute, in purely statutory proceedings, is utterly null and void and may be collaterally assailed."

In Settlemeier v. Sullivan, 97 U. S. 444-449, Mr. Justice Field says:

> "We do not question the doctrine that a court of general jurisdiction, acting within the scope of its authority, that is, within the boundaries which the law assigns to it with respect to subjects and persons, is presumed to act rightly and to have jurisdiction of the judgment it pronounces until the contrary appears, but this presumption can only arise with respect to jurisdictional facts concerning which the record

> is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. If the record gives the evidence or makes an averment with respect to a jurisdictional fact, it will be taken to speak the truth and the whole truth in that record, and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred."

In Galpin v. Page, 18 Wall. 366, we find the following statement:

> "If it appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appears in like manner that the service was made upon a person other than the defendant, it will not be presumed in the silence of the record that it was made upon the defendant also."

The correct principle we believe to be clearly expressed by Mr. Loveland (Bankruptcy, Sections 243, 244) as follows:

> "An adjudication is conclusive only as to facts directly and distinctly put in issue and the finding of which is necessary to uphold the adjudication. An adjudication which is correct in form and made by a court having jurisdiction of

the bankrupt is binding and conclusive on the bankrupt and creditors. If the record shows a lack of jurisdiction, the adjudication is null and void and may be assailed in a collateral proceeding. In order to render an adjudication void, the absence of jurisdiction must affirmatively appear on the record. This may occur where an adjudication is made upon the petition of two creditors, the law requiring three, or where the petition is filed against a farmer or wage earner or a municipal, railroad, insurance or banking corporation, being expressly exempt from bankruptcy by the Act; or where it appears that the debtor has not had his residence, domicile or place of business within the district the requisite length of time; or that the petitioner's debts do not amount to $500; or that the total indebtedness of the alleged bankrupt is less than $1000. But if an issue of fact is made concerning these matters, the adjudication is not void. The decision of such issues may be erroneous and invalid. The distinction, therefore, between a void and invalid adjudication is important. If the record shows an absence of jurisdiction, the adjudication is void. In such cases it is never too late to make the objection that the court is without jurisdiction, and the adjudication may be even collaterally attacked. In the one case the court acts without authority and the action of the court is void; in the other, the court only errs

> in judgment upon a question properly before the court for adjudication, and, of course, the order of the court is only voidable'.'

It is said that appellant is barred by the doctrine of *res adjudicata*; that appellant's debtor, Consumers Lumber & Supply Company, has been adjudicated a bankrupt. By the terms of the statute one only can be adjudicated bankrupt, on involuntary petition, who has committed an act of bankruptcy defined in the Act. Is the fact, then, established by this adjudication that the Consumers Lumber & Supply Company committed the act of bankruptcy alleged in the petition? But that act, the Supreme Court of the United States has held is not an act of bankruptcy. Is it established by this adjudication that it committed some other act? But no other is alleged.

It is suggested that the appellant is barred because, after its demurrer to the petition was overruled, it participated in the bankruptcy proceedings. This would unquestionably be the result of the appearance if the adjudication were merely voidable. We submit, however, that in the citation of authorities, in support of this proposition, the clear distinction between judgments that are merely erroneous and voidable and those wholly without jurisdiction and void, is overlooked. To draw an analogy which at first presentation seems strained, but which on critical examination we believe to be exact and fair—Assume an indictment in a United States District Court, charging a person with the

common law crime of robbery, in having by force or putting in fear feloniously taken property from the person or another, and with no reference in the indictment to a specific United States statute; in ignorance of the law, under the advice of misinformed counsel, the defendant pleads guilty and is sentenced to imprisonment—would not the judgment be absolutely void and subject even to collateral attack in spite of the adjudication and in spite of his appearance and consent?

In In re Coy, 127 U. S. 731, 757, the court says:

> "It certainly was not intended to say that because a Federal Court tries a prisoner for an ordinary common law offense, as burglary, assault and battery, or larceny, with no averment or proof of any offense against the United States or any connection with any statute of the United States, and punishes him by imprisonment, he cannot be released by habeas corpus because the court which tried him had assumed jurisdiction, that its judgment was not subject to collateral attack."

It was said in Metcalf v. Watertown, 128 U. S. 586:

> "Want of jurisdiction is a question that the court should consider wherever and however raised, even if the parties forbear to make it or consent that the case may be considered on its merits."

In that case there was an express stipulation that the case be tried on its merits, but it was dismissed on the court's own motion, its attention having been attracted to a want of jurisdiction appearing on the face of the record in reference to the residence of the parties.

> "Where residence is a necessary prerequisite to jurisdiction, the fact that a defendant living outside of the circuit, appears by his solicitor and confesses the bill will not confer upon the court jurisdiction."
>
> State v. Judge of 2nd Judicial Court, 13 La. Annual 89.
>
> "Consent will not confer jurisdiction on a court which does not possess it otherwise."
>
> Burkle v. Eckert, 3 N. Y. 132.
>
> "Proof by creditors of their claim in proceedings in bankruptcy will not give jurisdiction to a bankrupt court if it does not already possess it."
>
> Ansonia Brass & Copper Co. v. New Lamp Chimney Co., 64 Barber, 435.

In the case of Johnson v. Ball, 15 N. H. 407, the Supreme Court of New Hampshire held that, bankruptcy having been pleaded as a defense, and it appearing on the face of the record that the petition in bankruptcy lacked an averment of residence, it was invalid and afforded no defense in an action upon the debt which otherwise would be discharged.

"The jurisdiction of a bankruptcy court must affirmatively appear from the face of its record."

In re Plotke, 104 Fed. 964.

"If upon the face of the record a judgment is shown to have been rendered without jurisdiction of the subject matter or the parties, it will be treated as a nullity whenever or however drawn in question."

In re Columbia R. E. Co., 4 Amer. Bankruptcy Rep. 416.

"It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case."

Bank v. Calhoun, 102 U. S. 260.

In the case of Central Trust Company v. Virginia Steel & Iron Company, 55 Fed. 769, it appeared that the defendant company had appeared in the case and consented to the appointment of receivers requested by the plaintiff. It subsequently developed that neither plaintiff nor defendant was a resident of the district. The court on its own motion entered an order vacating the order appointing the receivers, discharging the receivers and dismissing the suit.

In State v. Tolleston Club, 53 Fed. 18, the court says:

"The want of jurisdiction is affirmatively shown on the face of the record. In such case neither silence nor positive consent will confer

jurisdiction because the parties cannot confer on the court jurisdiction denied to it by the statute."

From the foregoing we believe the following principles of law applicable to this case to be deducible:

1. The petition in bankruptcy failed to allege an act of bankruptcy under the bankruptcy law;

2. The United States District Court for the District of Oregon, sitting as a court of bankruptcy, acquired no jurisdiction to entertain the petition, to adjudge the Consumers Lumber & Supply Company a bankrupt, or to appoint a trustee;

3. Neither the appearance of the Larkin-Green Logging Company, defendant and appellant herein, by its demurrer to the petition, nor the filing and proof of its claim as a creditor, could confer jurisdiction upon the court which it did not acquire by the filing of the petition;

4. The adjudication and all proceedings thereunder are absolutely null and void and may be called in question by any person at any time and in any manner;

5. The plaintiff and respondent herein, being appointed under a void adjudication, is not legally a trustee in bankruptcy and has no legal capacity to sue as a trustee in bankruptcy or to prosecute this suit against this defendant-appellant;

6. The complaint herein should have been dismissed and an order entered in the bankruptcy proceedings dismissing the same with all proceedings thereunder;

7. The District Court erred in denying appellant's motion to dismiss the bill.

Respectfully submitted,

KOLLOCK, ZOLLINGER & MCDOWALL,
Solicitors for Appellant.